



Comptroller General
of the United States

Washington, D.C. 20548

950270

Decision

Matter of: White Water Associates, Inc.

File: B-253825

Date: August 26, 1993

William A. Shook, Esq., and Mark Ruge, Esq., Preston, Gates, Ellis & Rouvelas Meeds, for the protester.
Allen W. Smith, Department of Agriculture, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that contracting agency improperly failed to set aside a request for quotations for exclusive small business concern participation is dismissed as untimely since it was not filed until after the date set for receipt of quotations.

2. Protest that contracting agency improperly failed to make award to protester under small business-small purchase set-aside after awardee's purchase order was terminated is untimely where protest was filed more than 10 working days after the basis of protest was known or should have been known.

DECISION

White Water Associates, Inc. protests the decision by the U.S. Forest Service, Ottawa National Forest, to reissue request for quotations (RFQ) No. R9-07-93-1, for monitoring the nesting of neotropical migrant breeding birds, on an unrestricted basis. White Water, a small business concern, argues that the RFQ should have been set aside for exclusive small business concern participation.

We dismiss the protest as untimely.

The RFQ was originally issued on March 9, 1993, pursuant to the small business-small purchase set-aside procedures of Federal Acquisition Regulation (FAR) § 13.105. Under that provision, with enumerated exceptions, acquisitions of supplies or services that have anticipated dollar values of \$25,000 or less and that are subject to small purchase procedures shall be reserved exclusively for small business concerns. FAR § 13.105(a). The agency received quotations

from both firms solicited. White Water submitted a quotation of \$9,860, and Whitefish Point Bird Observatory submitted a quotation of \$7,500; the government estimate was \$8,000. After the purchase order was issued to Whitefish, White Water filed a size status protest with the Small Business Administration (SBA), arguing that Whitefish, a non-profit organization, could not qualify as a small business concern.¹ SBA determined that Whitefish was other than a small business concern,² and the agency terminated its purchase order on June 1.

On June 3, the purchasing agent decided to complete the purchase on an unrestricted basis, rather than make award to White Water under the original RFQ, based upon FAR § 13.105(d)(3). Under that provision, if the contracting officer does not receive a reasonable quotation from a responsible small business concern under a small business-small purchase set-aside, he may cancel the set-aside and complete the purchase on an unrestricted basis. Here, the purchasing agent concluded that White Water, the only small business concern offeror under the RFQ, submitted an unreasonable quotation.

The protester received a copy of the reissued RFQ on June 11, and the firm's business administrator telephoned the purchasing agent to express her disagreement with his decision to readvertise the RFQ on an unrestricted basis. They also discussed White Water's June 4 letter to the agency, in which the firm reaffirmed its interest in the procurement and named two additional small business concerns that the protester asserted were qualified and interested in the solicitation. The purchasing agent sent each of these firms a solicitation package but did not reverse his determination to proceed with the procurement on an unrestricted basis.

The agency issued the purchase order to Whitefish, which had submitted the only quotation under the reissued RFQ, on June 21. White Water filed a protest in this Office on that same date. Performance under the purchase order has been suspended pending resolution of this protest.

¹White Water based this argument on 13 C.F.R. § 121.403(a), which states that "[a] business concern eligible for assistance as a small business is a business entity organized for profit."

²SBA made this determination based upon Whitefish's failure to submit requested information concerning the size protest.

White Water argues that the agency improperly failed to set aside the RFQ for exclusive small business concern participation. The protester contends that the purchasing agent unreasonably determined that the agency would not receive quotations from two or more responsible small business concerns, because White Water had provided it with the names of two firms that were interested in the procurement.³

Under our Bid Protest Regulations, a protest based on alleged improprieties in a solicitation, which are apparent on the face of the solicitation, must be filed prior to the closing date for receipt of quotations. 4 C.F.R. § 21.2(a)(1) (1993); Digital Techs., Inc., B-243795, May 31, 1991, 91-1 CPD ¶ 520. Here, the reissued RFQ, received by the protester on June 11, indicated on its face that the small business-small purchase set-aside did not apply, and its accompanying cover letter clearly informed bidders that the solicitation was being completed on an unrestricted basis. The RFQ set forth 4:30 p.m. on June 17 as the deadline for receipt of quotations. Thus, to be timely under our Regulations, White Water's protest would have to have been filed by that time. As White Water did not file the protest until June 21, the protest is untimely. See Industrial Packaging Co., Inc., B-243196, May 13, 1991, 91-1 CPD ¶ 462.

To the extent that White Water argues it raised its challenges to the RFQ orally with the agency on June 11, prior to the closing date, the argument is without merit. In order to be effective, a protest must be made in writing and timely filed; an oral complaint is not sufficient. See 4 C.F.R. § 21.1(b); FAR § 33.101; Riverside Research Inst., B-234844, Mar. 31, 1989, 89-1 CPD ¶ 340. Oral protests to an agency before filing a written letter of protest do not toll our timeliness requirements. Tandy Constr., Inc., B-238619, Feb. 22, 1990, 90-1 CPD ¶ 206.

White Water, in its comments on the agency report, contends for the first time that the agency improperly failed to make award to it under the original solicitation. As discussed above, the agency states that award was not made to White

³Under FAR § 13.105(d)(2), if the contracting officer determines there is no reasonable expectation of obtaining quotations from two or more responsible small business concerns that will be competitive in terms of market price, quality, and delivery, the contracting officer need not proceed with the small business-small purchase set-aside and may purchase on an unrestricted basis.

Water following the termination of the purchase order with Whitefish because the purchasing agent determined, in accordance with FAR § 13.105(d)(3), that White Water's quotation was unreasonable. White Water now asserts that that determination was improper. This basis of protest is also untimely.

Under our Bid Protest Regulations, a protest of other than an alleged solicitation impropriety shall be filed not later than 10 days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2). The record shows that though White Water may not have known precisely why it did not receive the award under the original solicitation, it was certainly on notice that the agency did not intend to make award to it by no later than June 11. While a protester has the affirmative obligation to diligently pursue the information forming its bases of protest, see Adrian Supply Co.--Recon., B-242819.4; B-242819.5, Oct. 9, 1991, 91-2 CPD ¶ 321, there is no evidence of such diligent pursuit here. In fact, the affidavit submitted by White Water's business administrator, in which she chronicles her June 11 conversation with the purchasing agent, does not show that White Water was at all concerned with the agency's failure to make award to it under the original solicitation.⁴ As White Water did not protest the agency's action in this regard until it filed its comments on August 18, this basis of protest is also untimely.

The protest is dismissed.

Christine S. Melody

Christine S. Melody
Assistant General Counsel

⁴We note that, in its requests for relief in both its protest and its comments on the agency report, White Water does not ask that we declare it entitled to award under the original solicitation. Rather, it merely asks that we recommend termination of the award to Whitefish and reissuance of the RFQ as an exclusive small business concern set-aside.